

³ The Board notes that, following the June 18, 2018 decision, OWCP received additional evidence. However, the *Board's Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 25, 2017, as he had no residuals or disability due to the accepted April 3, 2011 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability on and after August 25, 2017.

FACTUAL HISTORY

On June 28, 2011 appellant, then a 44-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging that lifting, bending, and pushing while in the performance of duty caused his L4-5 herniated disc with radiculopathy. He noted that he first became aware of his claimed condition on April 3, 2011 and related it to his federal employment on June 23, 2011. Appellant had stopped work on April 2, 2011 and returned to work with restrictions on May 31, 2011. OWCP accepted the claim for aggravation of L4-5 herniated disc. It paid appellant intermittent wage-loss compensation benefits on the supplemental rolls commencing April 4, 2011.⁴ By decision dated July 20, 2015, OWCP accepted that he had a recurrence of disability effective May 30, 2015.

In a work capacity evaluation (Form OWCP-5c) dated January 26, 2016, Dr. Uday Bhatt, a Board-certified physiatrist, indicated that appellant was capable of working four hours per day with restrictions.

The employing establishment offered appellant a modified-duty position on February 9, 2016 working four hours a day as a sales and service associate. Appellant accepted the position and returned to part-time work on February 20, 2016 as a sales and service associate.

Appellant submitted a number of reports, treatment notes, and work capacity evaluations (Form OWCP-5c) for the period March 18, 2016 to March 10, 2017 from Dr. Bhatt who diagnosed lumbar herniated disc syndrome and supporting partial disability.

On September 9 and 23, 2016 OWCP referred appellant for a second opinion evaluation with Dr. James A. Charles, a Board-certified neurologist and clinical neurophysiologist, for an neurological evaluation and opinion regarding the status of appellant's accepted conditions and his work capacity.

In an October 11, 2016 report, Dr. Charles, based on a review of the medical evidence, a statement of accepted facts (SOAF), and the physical examination, diagnosed lumbar and cervical musculoskeletal and ligament strains which he opined were unrelated to the accepted April 3, 2011 employment injury. A review of appellant's lumbar spine magnetic resonance imaging (MRI) scan revealed left L4-5 paracentral disc herniation and L3-4 disc fragmentation. Dr. Charles observed that appellant's right lower extremity findings were attributable to either malingering or a somatoform disorder as the findings were nonphysiologic, nonorganic, and unrelated to the accepted April 3, 2011 employment injury. He noted that there was no evidence of cervical spinal cord or nerve root injury as appellant sustained a cervical musculoskeletal and ligamentous sprain.

⁴ The evidence of record does not establish when wage-loss compensation benefits paid on the supplemental rolls were terminated.

Dr. Charles opined that the accepted April 3, 2011 work injury caused no peripheral or central nervous system injury.

On January 13, 25, and 30, 2017 OWCP received undated reports from Dr. Bhatt diagnosing chronic lumbar radiculopathy which he attributed to lumbar herniated disc syndrome. Dr. Bhatt indicated that appellant was capable of working with restrictions. He noted that the accepted April 3, 2011 employment injury caused anatomic changes at L3-4 and L4-5 and resulted in permanent disability.

In progress notes dated February 14 and March 4 and 10, 2017, Dr. Bhatt provided examination findings and diagnosed lumbar herniated disc syndrome, radiculopathy, and congenital spondylolisthesis.

Dr. Bhatt completed several work capacity evaluations (Form OWCP-5c) covering the period March 10 to June 9, 2017 indicating that appellant was capable of working four hours per day with restrictions, which was increased to eight hours on April 7, 2017. He diagnosed aggravation of the L4-5 herniated disc.

In a March 22, 2017 report, Dr. Sandro LaRocca, a Board-certified orthopedic surgeon, diagnosed recurrent low back pain and right lower radiculopathy. Family, medical, and injury histories were discussed and examination findings provided. Dr. LaRocca noted that x-ray interpretations performed on June 16, 2016 were essentially normal. He recommended a lumbar spine MRI scan based on appellant's persistent symptoms of radiculopathy.

On May 18, 2017 OWCP referred appellant to Dr. Gayatri Devi, a Board-certified neurologist, pain medicine physician, and psychiatrist, to resolve a conflict in the medical opinion evidence between Dr. Bhatt, appellant's treating physician, and Dr. Charles, an OWCP referral physician, regarding whether appellant continued to have residuals and partial disability from his accepted employment injury.

In a report dated June 6, 2017, Dr. Devi, based on a review of appellant's medical record, an SOAF, and physical examination concluded that he no longer had residuals or disability due to the accepted April 3, 2011 employment injury. He observed that the pain and muscle spasm appellant experienced on or about April 3, 2011 may have been due to the accepted work injury. In support of this conclusion, Dr. Devi noted appellant's employment duties differed from his description that he was required to lift weights up to 800 pounds. He opined that appellant's pain did not correlate with MRI scan findings in 2011. Dr. Devi further noted that the MRI scans in 2011 and 2015 revealed some disc disease which possibly occurred at the time of the accepted employment injury, but may have been preexisting. He opined that appellant did not have any neurological pathology based on his examination findings which included normal reflexes. Moreover, Dr. Devi noted appellant's right lower extremity sensory changes were inconsistent with a peripheral neuropathic or radiculopathic pattern. He concluded that appellant was capable of performing his date-of-injury employment position with no restrictions.

On June 21, 2017 OWCP issued a notice of proposed termination advising appellant that it had determined that he no longer had residuals or disability due to his accepted employment injury. In support of this proposed termination it accorded the special weight of the medical opinion evidence rested with the opinion of Dr. Devi, an impartial medical examiner. Appellant was afforded 30 days to respond.

In response to OWCP's proposed termination of benefits, appellant submitted a June 29, 2017 MRI scan and progress notes dated June 9 and July 17, 2017 and work capacity evaluations (Form OWCP-5c) dated July 7 and August 8, 2017 from Dr. Bhatt, which were repetitive of prior reports and notes.

Dr. LaRocca, in a July 12, 2017 report, detailed examination findings and reviewed a June 29, 2017 lumbar spine MRI scan. He reported that appellant complained of low back pain radiating into the right lower extremity. Dr. LaRocca diagnosed L4-5 disc herniation and L5-S1 neural foraminal stenosis which he opined might be the cause of the complaints on the right side. He recommended further testing and continuing with Dr. Bhatt's recommendation that appellant work four hours per day.

By decision dated August 24, 2017, OWCP finalized the termination of appellant's compensation benefits effective August 25, 2017.

On August 29, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. The hearing was held on January 29, 2018.

OWCP received progress notes for the period August 4, 2017 to January 26, 2018 from Dr. Bhatt.

In a report dated September 6, 2017, Dr. Nirav K. Shah, a Board-certified neurosurgeon, related that appellant was seen for low back pain radiating into his lower extremities. Appellant's physical examination revealed right sacroiliac joint tenderness, no lower spinal tenderness, positive right straight leg raising, and normal gait. Diagnoses included lumbar radiculopathy, cervicalgia, and traumatic lumbar intervertebral disc rupture. Dr. Shah opined that appellant continued to suffer residuals of the work-related conditions and that the current part-time work restrictions should continue indefinitely.

In a January 15, 2018 report, Dr. Bhatt noted his disagreement with Dr. Devi's June 6, 2017 report and his motor neurological examination. He explained that it is difficult to assess motor strength when there was a pain component. Dr. Bhatt opined that appellant's injury caused permanent L3-4 and L4-5 anatomic changes and permanent disability. However, he opined that appellant was capable of working with restrictions.

By decision dated March 5, 2018, OWCP's hearing representative affirmed the August 24, 2017 decision terminating appellant's wage-loss compensation and medical benefits. She found the special weight of the medical opinion evidence rested with the opinion of the impartial medical examiner, Dr. Devi.

Subsequent to the March 5, 2018 decision, OWCP received progress notes dated July 7, 2017 and February 23, 2018 from Dr. Bhatt. Dr. Bhatt, in the February 23, 2018 progress note, repeated findings and diagnoses from prior reports.

On March 22, 2018 appellant, through counsel, requested reconsideration.

By decision dated June 18, 2018, OWCP denied modification of its prior decision, finding that the evidence of record was insufficient to establish that appellant had continuing residuals or disability due to the accepted April 3, 2011 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer had residuals of an employment-related condition, which would require further medical treatment.⁹

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁰ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹ When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 25, 2017.

Appellant's attending physician, Dr. Bhatt continued to find that appellant was partially disabled for work and had ongoing residuals requiring medical treatment due to his accepted

⁵ *H.P.*, Docket No. 18-0851 (issued December 11, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *J.D.*, Docket No. 18-0958 (issued January 8, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *See D.P.*, Docket No. 18-0038 (issued January 4, 2019); *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *H.P.*, *supra* note 5; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *J.B.*, Docket No.17-2021 (issued August 8, 2018); *Kathryn E. Demarsh*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003).

¹⁰ 5 U.S.C. § 8123(a); *see B.B.*, Docket No. 18-1121 (issued January 8, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018).

¹¹ 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

¹² *See R.P.*, *supra* note 10; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

April 3, 2011 employment injury. OWCP referred appellant for a second opinion evaluation with Dr. Charles. In his October 11, 2016 report, Dr. Charles found that appellant had no ongoing medical residuals or disability due to his accepted April 3, 2011 employment injury. Due to the conflict between Drs. Bhatt and Charles, OWCP properly referred appellant for an impartial medical examination with Dr. Devi to resolve the conflict of medical opinion evidence.

On October 23, 2017 Dr. Devi described appellant's April 3, 2011 employment injury and reviewed his medical history. He provided findings on physical examination, and noted neurological findings. Dr. Devi concluded that appellant's accepted April 3, 2011 employment injury possibly caused a neurologic disability. He further concluded that appellant had no continuing disability as a result of his accepted April 3, 2011 employment injury and that he could return to work without restrictions.

The Board finds, however, that Dr. Devi's report is not entitled to the special weight of the medical evidence as it is not based on the accepted condition of aggravation of disc herniation at L4-5 as set forth in the SOAF. Rather, he opined that appellant had muscle spasm and pain which "may have been related to work related injury" and also noted that he had some disc disease "which may have been preexisting or possibly incurred at the time of the injury." Dr. Devi did not accept the facts as presented in the SOAF in rendering his medical opinion as he opined that the April 3, 2011 employment injury possibly caused appellant's disc disease. OWCP's procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹³ Dr. Devi did not follow the SOAF as to the accepted conditions of the claim. As such, his opinion is of insufficient probative value to carry the special weight of the medical evidence as an impartial medical examiner.¹⁴

The Board thus finds that OWCP erred in relying on Dr. Devi's opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted employment condition and therefore has not met its burden of proof.¹⁵

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 25, 2017.

¹³ See *M.D.*, Docket No. 18-0468 (issued September 4, 2018).

¹⁴ *R.D.*, Docket No. 17-0415 (issued April 13, 2018).

¹⁵ In light of the Board's finding in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 25, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board